

1 approximately?

2 MR. SEIVER: I don't remember exactly what
3 the -- because he did go out to check some of the
4 poles, and I can't tell you he did them all before his
5 deposition. I remember he did do a drive through and
6 went and checked some of them, but basically he was
7 relying on pictures, and I think from what you'll see
8 from his testimony, Your Honor, it's not necessarily
9 because there's only a six inch or eight inch. I
10 mean, his theory of the case is that if a pole can be
11 rearranged or changed out, it's really irrelevant.
12 The only full pole that he has testified to is one
13 that I don't think there's any dispute about where it
14 goes underneath an overhead transmission line and
15 there's only so much higher that pole could go.

16 Outside of that his testimony is for a
17 full capacity pole, is that if it can be changed out
18 or rearranged or drip loop tightened or sag pulled, it
19 will go into compliance, and the NESC violations
20 corrected, and you either have room or you change out
21 the pole and then you have room.

22 So it's not as if the four inches or the

1 six inches are going to be determinative of his
2 ultimate conclusion. They are examples to be
3 illustrative of a pole that was picked. Here's a pole
4 in the field, with the assumptions of the different
5 heights and different clearances being basically,
6 okay, this is what I've looked at.

7 He did drive by every single one of the
8 poles, and just like the first pass for Osmose, that
9 was an eyeball, and most of them had been measured by
10 these gentlemen, and then he also did some confirming
11 measurements.

12 JUDGE SIPPEL: So he did some spot
13 checking in effect.

14 MR. SEIVER: Yes, Your Honor.

15 JUDGE SIPPEL: Mr. Harrelson, I mean.

16 MR. SEIVER: Yes.

17 JUDGE SIPPEL: All right. Now, what's the
18 significance of this data for you, for Gulf Power?

19 MR. CAMPBELL: Well, number one, they're
20 attempting to undercut our data based on some of the
21 cards --

22 JUDGE SIPPEL: Are they attacking your

1 pole measurements or are they using this to beef up
2 their own pole measurements?

3 MR. CAMPBELL: A little of both I think is
4 the answer to that question.

5 And, by the way, this is not the only
6 information these witnesses have. This brings the
7 critical issue to head, but of course, they have other
8 relevant information in the case. So their testimony
9 is not going to be overly duplicative.

10 For example, the CHELCO agreements that
11 Your Honor has indicated we at least have the right to
12 cross examine these witnesses on, we didn't even have
13 them prior to the depositions of these witnesses.

14 JUDGE SIPPEL: Did you ask them any
15 questions about those?

16 MR. CAMPBELL: We asked them about the
17 rate, but of course, we didn't have the documents with
18 the terms and conditions and all of that.

19 That's how we were tipped off, by the way,
20 that those documents even existed, because it came up
21 during deposition.

22 But, again, discovery deposition, trial

1 testimony, very different creatures. They're parties
2 to this proceeding. They're undercutting our
3 assertions in this case based on facts and positions
4 that the Complainants have taken and passed along to
5 an expert. They can't shield themselves from cross
6 examination that way.

7 And one of two things is what we're
8 requesting. One, the opportunity to cross examine
9 them as part of their case on the designations that
10 were originally made in their case before they
11 attempted this turnabout, or to call them as adverse
12 witnesses in our case so that we can lead them through
13 what will be a typical cross examination of the party
14 who's making accusations against you in the case.

15 They're the Complainants.

16 JUDGE SIPPEL: Yes, I understand that, but
17 you have the burden of proof.

18 MR. CAMPBELL: Correct.

19 JUDGE SIPPEL: But you want to cross
20 examine them on the methodology and what they did in
21 terms of making these measurements? I mean how --

22 MR. CAMPBELL: First and foremost, we

1 wanted to cross examine them on the assertions they
2 made as part of their case-in-chief. They submitted
3 the deposition testimony which was discovery
4 testimony, not trial testimony, and said, "Accept this
5 as fact in the case."

6 And we said, okay, consistent with an FCC
7 rule, if you're going to do that, then we get to cross
8 examine them on those assertions in a trial setting.

9 And they said, "Oh, no, no, no, we don't
10 want to do that. So we'll withdraw it, okay, and
11 we'll call it a cross designation."

12 I don't think that changes the impact of
13 the rule, by the way. They are obligated to be here,
14 and they don't --

15 JUDGE SIPPEL: I'm sorry to cut you off.
16 Are these people employees or are they executives?
17 What?

18 MR. CAMPBELL: These are the people who
19 were tendered by the Complainants as 30(b)(6)
20 representatives of each of the cable companies that
21 are parties to this proceeding, people most
22 knowledgeable about the facts or the subjects we put

1 in our deposition notices. These are the people they
2 tendered as their representatives, the face of
3 Comcast, the face of Cox, the face of Brighthouse.
4 These are the people they put up.

5 JUDGE SIPPEL: So these are parties.

6 MR. CAMPBELL: Yes, sir.

7 MR. SEIVER: They're employees, Your
8 Honor, and the reason that we picked them is because
9 it didn't make any sense to bring executives from
10 Philadelphia or, you know, New York or wherever. It
11 seemed like all of the evidence that seemed relevant
12 are what's happening out in the field in Pensacola,
13 and these are the construction engineers or managers
14 that manage the pole plant that have the relationships
15 with Gulf Power.

16 I don't know if there's anything else that
17 they're going to get out of them besides what they got
18 at deposition, and their measurements don't attack --
19 they didn't go out and remeasure the Gulf poles. They
20 only measured the poles that we identified. We don't
21 have anything of theirs that goes to their 50 pole
22 identification.

1 JUDGE SIPPEL: These are four people now.
2 Are they four people? Do they all do the same thing?
3 Do they all work on different poles?

4 MR. CAMPBELL: It's one representative
5 from each company.

6 JUDGE SIPPEL: Ah, okay.

7 MR. CAMPBELL: And each company has a
8 different service territory. Each company has
9 different relations with Gulf Power. You know, so
10 there are some differences.

11 JUDGE SIPPEL: Well, why do you need to
12 ask the same questions of four witnesses or four
13 people?

14 MR. CAMPBELL: They each four had
15 different answers would be my answer to that question.
16 The answers were not the same we got from each one of
17 them on certain questions, and we don't know that
18 their answers to questions we didn't ask them in a
19 typical cross examination that you would do at
20 trial -- we can't anticipate the differences that
21 might exist there.

22 JUDGE SIPPEL: Well, then how in the heck

1 did you get yourself into this kind of a box? Was it
2 a misunderstanding that you thought they were going to
3 show up here in their case-in-chief and --

4 MR. CAMPBELL: They did show up in their
5 case-in-chief by way of deposition designations, and
6 that entitles us to cross examine those witnesses.
7 We're only here --

8 JUDGE SIPPEL: So they're testifying here
9 through their depositions.

10 MR. CAMPBELL: Yes, sir.

11 JUDGE SIPPEL: All right.

12 MR. SEIVER: We're withdrawing those, Your
13 Honor. If that's --

14 JUDGE SIPPEL: They're coming in, and
15 let's try and make it as comfortable for them as we
16 possibly can. I'm not going to let you go down the
17 road from A to Z with every single one of these
18 witnessers.

19 MR. CAMPBELL: Your Honor, we will respect
20 the rules and the rules as you impose them in this
21 court. We will be as efficient as we can in getting
22 those gentlemen out of here. We're not here to

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1 prolong this proceeding. We just want to exercise the
2 right we have under the rules. That's all.

3 JUDGE SIPPEL: Can you get them on and off
4 the stand in half a day?

5 MR. CAMPBELL: All of them? I think that
6 might be pressing it, but I certainly know that we can
7 get them all off in a day.

8 Again, it's hard to anticipate how long-
9 winded one of them might get in trying to explain
10 something, but we will do our dead level best.

11 JUDGE SIPPEL: Well, maybe we'll have a
12 short lunch that day.

13 MR. CAMPBELL: Okay.

14 MR. SEIVER: Your Honor, this is a big
15 hardship for us. I mean, I never expected that after
16 the depositions, even with deposition designations,
17 that there would be anything -- I don't know what it
18 is. I mean, if they're going to the authenticity of
19 the measurements, what's asking them anything about
20 those measurements? I guess they want to ask them
21 about the CHELCO agreements.

22 None of this has anything to do with what

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1 their burden of proof is in the case. I think we're
2 going to have a side show, and it's going to be very
3 difficult for me now to try and get all four of them
4 here on the same day to be available and make sure I
5 can shuttle them in and out of the courtroom, and I'm
6 not sure I understand what more is going to be gotten
7 out of them than what he got out of them at
8 deposition.

9 They did that, designate deposition
10 excerpts, themselves. I don't think they expected
11 that they were going to come and they saw, "Oh, Seiver
12 designate them. So let's" --

13 JUDGE SIPPEL: I understand that you did
14 designate them though.

15 MR. SEIVER: I didn't designate them as
16 witnesses giving direct testimony. I designated
17 excerpts from the depositions that they took. I
18 didn't ask any questions at the deposition.

19 JUDGE SIPPEL: And now you've decided to
20 pull them.

21 MR. SEIVER: Well, I was doing it -- I was
22 afraid. I said there's going to be an issue that

1 comes up. I haven't seen their direct case. These
2 guys' deposition probably has something to do with an
3 issue in their direct case. So I looked at it,
4 figured out that they might ask about what they did
5 and pulled out very limited, very limited pieces.

6 If you look at it the reason that they're
7 multiple pages is because four pages go on a single
8 page, and gosh, in Shayne Routh I think there are only
9 four pages, four of the eight-by-ten pages.

10 If anything it was almost as a perfunctory
11 designation, not intended to, you know, open up the
12 case into, you know, bringing them in for live
13 testimony on issues that they did have an opportunity
14 to ask. They knew which those poles are, and if
15 they're worried about the pole measurements, they knew
16 which poles we designate in January.

17 JUDGE SIPPEL: But Mr. Campbell said he
18 didn't see the measurements until the day of the
19 deposition.

20 MR. SEIVER: The precise measurements we
21 did give them that day, but they knew for almost two
22 months what those poles were that they had done the

1 measurements on. I don't know what else they would
2 have done beyond going out to remeasure the poles,
3 which they could have done in those two months as
4 opposed to looking at what was written down on the
5 piece of paper.

6 JUDGE SIPPEL: And these are parties.
7 These are the people that you identified by each of
8 the individual parties as being the representative of
9 the company that would be most knowledgeable of the
10 basis of your case.

11 MR. SEIVER: Well, Your Honor, no, no, not
12 the basis of the case. We never would have put them
13 on for deposition; I never would have brought them up
14 here to testify anything in this case except they --

15 JUDGE SIPPEL: Let me restate that then.
16 Your 50 pole designation, these were the guys that you
17 were relying on for your 50 pole designation.

18 MR. SEIVER: They worked with our expert.
19 They are the ones that know the plant, and Mr.
20 Harrelson said, you know, "Give me some examples.
21 Tell me where to go. I don't know just driving down
22 the street if that's a Mediacom pole or that's a

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1 Comcast pole, you know, who's on which pole."

2 So he did rely on them to pick poles.

3 JUDGE SIPPEL: And you are going to have
4 a chance to cross examine their company
5 representatives; isn't that correct? They're going to
6 be here as live witnesses and you're going to cross
7 examine them?

8 MR. SEIVER: Not on the 50 -- I mean, I
9 don't know about on the 50 poles. If they are, they
10 are. I don't know who did their pole designation.
11 Their depositions of their witnesses were over by the
12 time we got those 50 poles.

13 Some of them are the Osmose poles. I
14 guess there are 40 of them Osmose.

15 MR. CAMPBELL: It's clearly set forth in
16 our prefiled written direct who's testifying about the
17 pole measurements, and our representatives will be
18 here, and they will have the ability to cross examine
19 our witnesses. Our witnesses will be here live.

20 MR. SEIVER: Well, 40 of the poles are
21 Osmose poles, and you know, we already stipulated the
22 authenticity. So there's nothing more we can ask

1 about those pole measurements, and ten are Knology
2 poles, of which I believe some didn't even have
3 pictures. So we don't even know where those poles
4 are.

5 So we're at a dead end on those, but
6 that's fine. I figured if that's their burden and
7 they want to put in poles like that, but we agreed to
8 the authenticity. So if it's at 21.6 or 22.2, deal
9 with it.

10 But to have someone come in just to be
11 grilled about whether it is 21.6 or 22.2 didn't seem
12 to make any sense, and as I said, Your Honor, the only
13 reason that we even provided them for deposition was
14 to accommodate their demand, their discovery demands
15 that they wanted these people. I didn't want to do it
16 at an accommodation. I guess it was a mistake. I
17 offered them up and said, "Okay. Here at the guys
18 that know about the relationship between Gulf Power
19 and Comcast, Gulf Power and Brighthouse, that do stuff
20 out in the field. So you can ask them, you know, how
21 things went or what happened."

22 They had given them the 50 poles. They

1 knew which 20 there were in Pensacola, of which I
2 think at least ten of them were already Osmose poles
3 and measured, and which ten were from Brighthouse and
4 which ten from Mediacom, and they could have measured
5 those poles months before. If they didn't want to do
6 that, that's fine.

7 But if they want to come and beat up these
8 guys over a measurement, I think we're wasting
9 everybody's time and money to bring them up here
10 when --

11 JUDGE SIPPEL: Well, you know, this is
12 discomfoting to hear this in this way though because
13 there's been all of this emphasis upon it has to be a
14 pole-by-pole determination as to whether or not
15 they're being utilized in full capacity, and you've
16 been beating that point to a fare thee well since the
17 beginning of this case.

18 And we have set this case up essentially
19 with that in mind. That's why the Osmose survey was
20 being done, and now we come down to the final act in
21 this proceeding, and you are somehow or other
22 reluctant to proffer your witnesses who went out and

1 took the tape and measured these things.

2 It's not going to be that long. I mean,
3 we're not going to go into two weeks' testimony on
4 this.

5 Here's what I'll let you do. You can se
6 it up, within reason, you can set it up. You don't
7 have to bring them all in on the same day. You can
8 bring them in at their convenience, and I'm going to
9 be looking for them to be on and off the stand within
10 two hours. I mean each of them, no more than two
11 hours. That gives you plenty of time to introduce
12 them, give some kind of an explanation as to what they
13 did, and I'm not offering two hours. I'm simply
14 saying no longer than.

15 And you can bring them in on different
16 days. You don't have to bring them in all at the same
17 time, and I don't think that two hours of their time
18 in light of what they've done is that disconcerting.

19 MR. SEIVER: Well, Your Honor, they're
20 going to all come from the Pensacola area. I know
21 counsel here and Gulf Power people are going to be
22 coming up from there, but these are not executives.

1 These are, you know, guys that work in the field.
2 These are line engineers, construction people.

3 And I feel like I got on a slippery slope
4 by agreeing. I should have watched the notices of
5 deposition to begin with, and then we wouldn't have
6 had any of this.

7 JUDGE SIPPEL: Are you absolutely certain
8 that you need four instead of two? I mean, I know
9 that they work for different companies, but for the
10 point that you're trying to establish, do you need all
11 four?

12 MR. LANGLEY: Your Honor, we might be able
13 to narrow it down to two if that is something that
14 would make the Court more comfortable.

15 JUDGE SIPPEL: Well, I'm going to be very
16 upset if what Mr. Seiver says turns out to be true.
17 If we're just sitting here for a full day with a
18 measuring stick and everybody is going through
19 basically the same stuff.

20 I mean, certainly they are probably going
21 to be measuring different poles, but we're talking
22 primarily about the methodology they use and whether

1 or not they're capable of coming up with accurate,
2 well, I guess more than estimates, calculations, and
3 then what they know about these other agreements
4 perhaps.

5 I'm not sure what else you have in mind.
6 Am I missing something here?

7 MR. CAMPBELL: No. I mean, certainly we
8 don't want to tip our hand to our entire cross
9 examination strategy in advance.

10 JUDGE SIPPEL: I know.

11 MR. CAMPBELL: But generally I think
12 you're correct, Your Honor, and what we would like to
13 do is take it under advisement for maybe five minutes
14 or so and make a decision whether we think we can live
15 with two. I think it's a reasonable compromise, but
16 it's something that we had not been prepared to do,
17 but let us talk about that.

18 We want to make this thing go off as
19 smooth as everyone else, and if we can have five
20 minutes to discuss the issue, we may be able to do
21 that.

22 We would like to be able, however, to pick

1 the two that we get to cross examine instead of them
2 being dictated to us.

3 JUDGE SIPPEL: Well, I think you negotiate
4 it, too, but let's leave it at two. I mean, I feel
5 like I've been kind of wedged into the middle of this
6 because I'm taking both sides at face value in terms
7 of what you're arguing both factually and the
8 significance of this, but I can't let this case go
9 without hearing some kind of meaningful testimony on
10 what we're talking about.

11 What is a full capacity pole?

12 MR. SEIVER: Your Honor, you're going to
13 get that from Mr. Harrelson. You're going to get --
14 I don't know -- not from Mr. Spain, but Mr. Bowen and
15 Mr. Dunn, and Mr. Harrelson's analysis, a lot of it is
16 challenging what Gulf did. To the extent it's talking
17 about our poles, it's just, you know, the 50 that we
18 designated saying these are just examples. It's not
19 an evidentiary proof in the sense that, you know, this
20 or only this pole, but their 50 poles our guys did not
21 measure. Their 50 poles are what Mr. Harrelson went
22 out and looked at, and they'll have him for however

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1 much time they need him to --

2 MR. CAMPBELL: Your Honor, that highlights
3 the problem, is that I took Mr. Harrelson's
4 deposition, and he made a lot of broad, sweeping
5 statements and does in his prefiled written direct
6 about Gulf Power's practices and what they have always
7 done and what they have never done.

8 And when I asked him about the basis for
9 that he said, "Well, I asked the Complainants."

10 Yet I can't cross examine the people who
11 are allegedly making those statements that the witness
12 is relying on. So that's the problem, is that you
13 can't hide the ball.

14 But we're going to look at two witnesses.
15 We understand we have two hours. We're going to do
16 our dead level best to get them out of here, and I
17 think that we'll work with that.

18 JUDGE SIPPEL: All right. Well, you
19 consider it a 50 percent win, Mr. Seiver, and you
20 know, you can tell -- if they're complaining about
21 coming up here from Pensacola, the weather might be
22 better up here, but tell them that it's my fault, not

1 your fault.

2 That's it. It's 20 of four. This has
3 been a very productive and a very busy day. Is there
4 anything else now that we need to talk about?

5 Go off the record for two minutes, please.

6 (Whereupon, the foregoing matter went off
7 the record at 3:36 p.m. and went back on
8 the record at 3:37 p.m.)

9 JUDGE SIPPEL: Are we all set? Go ahead.

10 MR. COOK: There's only one matter that I
11 wanted to raise. Your Honor, in the ruling denying
12 our motion for an order arising out of the ruling
13 denying our motion for an order arising out of our
14 view that on February 10th they did not come forward
15 with what they were supposed to come forward with.

16 You had denied our proposed order as too
17 one-sided, but at the bottom of that order, you said
18 Complainants represent that they have not received,
19 and in fact it's true, colored photographs which we
20 were supposed to get of ten of the Gulf poles that are
21 their so-called Knology poles, the non-Osmose surveyed
22 poles.

1 You may remember their 50 poles consists
2 of 40 surveyed by Osmose and ten which they say were
3 changed out for the benefit of a new attacher named
4 Knology several years ago in the '98 to '999 time
5 frame.

6 We have never gotten color photographs of
7 ten of those poles, and in fact, we have no
8 photographs at all of five of those poles, and it was
9 certainly a working mutual assumption of I think both
10 of the parties and Your Honor when we entered into the
11 pre-Christmas holiday proposed order that each side
12 would go and get them.

13 And when I asked Mr. Chapman, the former
14 attorney for Gulf Power, you know, "How come you guys
15 have never given us these ten photographs or any
16 photographs at all of vive?" he said, "Well, they
17 don't exist in our files," to which I essentially
18 said, "Well, come on. You know where the poles are in
19 the field. Why didn't you send someone out there,
20 whether it was an Osmose person or somebody else, and
21 get the data and the photographs relating to those
22 poles?"

1 And we've never gotten them to this day,
2 and that is a concern for us.

3 JUDGE SIPPEL: I've got the FCC Order 05M-
4 60, released December 16th, 2005, Footnote 2. It
5 says, well, pretty much what Mr. Cook said. Colored
6 photographs of each pole.

7 Can you get them color photographs?

8 MR. LANGLEY: The answer to that question
9 is no because the knology documents that we submitted
10 and that we are relying on are documents from make
11 ready work done like Mr. Cook said, in the '99-2000
12 time frame.

13 If you went out to the same pole and, by
14 the way, there are addresses on these documents; so
15 there's no mystery as to where these poles are. If
16 you went out there today, the pole very well could
17 look different. It's a separate set of documents that
18 we are introducing bearing on this crowding issue, and
19 it's more in the nature of historical documents rather
20 than the Osmose information, which is obviously not
21 right now, but it's last spring. So it's more recent.

22 There are no color photographs of the

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1 Knology poles as they existed at the time of the
2 creation of those make ready documents that have been
3 produced. All we have are the five black and whites.

4 JUDGE SIPPEL: It sounds to me like
5 they've got less desirable evidence. I don't know why
6 you would be willing to beat on them to get them to
7 straighten out what they didn't do.

8 MR. COOK: Well, Your Honor, because you
9 just heard counsel say they know where these poles are
10 out in the field.

11 JUDGE SIPPEL: You don't know where they
12 are?

13 MR. COOK: We don't know as much as they
14 do. We certainly haven't been able to ascertain with
15 the same level of detail that they have.

16 Now, your order previously directed them:
17 go out and give Complainants the pictures of the poles
18 so that people like our expert, Mr. Harrelson, can
19 analyze them without having to track down -- and,
20 incidentally, it was very difficult to track down a
21 lot of the Osmose poles that Mr. Harrelson did. He
22 tracked down 39 out of the 40 Osmose poles, and a lot

1 of those addresses, Your Honor, were inaccurate by the
2 tune of about three to sometimes five blocks or so.

3 I actually went around Pensacola with Mr.
4 Harrelson at one point, and he would say, "Look.
5 Here's the address for this," and we'd be several
6 blocks over. So he invested quite a bit of time on
7 those Osmose poles.

8 JUDGE SIPPEL: Well, now, wait a minute,
9 Mr. Cook. We're talking about ten poles, aren't we?

10 MR. COOK: Right.

11 JUDGE SIPPEL: And did Mr. Harrelson get
12 to see the ten poles?

13 MR. COOK: He has not been able to because
14 there's no information that we have that they have
15 given us in the way of either photographs or
16 confirmed, definite addresses that I'm aware of, you
17 know, that --

18 JUDGE SIPPEL: You don't have any
19 photographs at all?

20 MR. COOK: Well, we have five black and
21 white photographs.

22 JUDGE SIPPEL: Out of ten poles.